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No. _____

In The Supreme Court Of The United States

BETTY MITCHELL, Warden,

Petitioner,

v.

WILEY DAVIS, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does federal law "clearly establish" that a state court trial judge must affirmatively instruct jurors that they need not be unanimous in finding that a particular mitigating circumstance exists in order for a given juror to consider that mitigating circumstance during the weighing of aggravating circumstances against mitigating circumstances?

2. Does federal law "clearly establish" that a state court trial judge must specifically explain to jurors that they are not required to unanimously reject a death sentence before considering a lesser sentence?

3. Does federal law "clearly establish" that a trial judge must specifically charge the jury to the effect that any single juror can prevent the imposition of the death penalty simply by refusing to sign the death verdict, and can do so for any reason or for no reason?

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of the Warden of the Mansfield Correctional Institution in Mansfield, Ohio, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, reported at 318 F.3d 682 (6th Cir. 2003), is attached as Appendix A. The Sixth Circuit's decision denying the Warden's petition for rehearing is attached as Appendix B. The opinion of the United States District Court for the Northern District of Ohio, reported at 100 F. Supp.2d 607 (N.D. Ohio 2000), denying Davis's petition for a writ of habeas corpus is attached as Appendix C. The Ohio Supreme Court's published decision on direct appeal, reported at 76 Ohio St.3d 107 (1996), is attached as Appendix D.

JURISDICTION

The United States Court of Appeals issued its opinion on February 4, 2003, and denied the Warden's petition for rehearing on April 25, 2003. This petition for Writ of Certiorari follows within ninety days. The Warden has timely filed his petition and invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) (2003).

RELEVANT STATUTORY PROVISIONS

Section 2254(d) of Title 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Ohio Revised Code, Title 29, Section 2929.03(D)(2) provides, in pertinent part:

> Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this

section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced [life imprisonment without parole, life with parole eligibility after serving twenty-five years, or life imprisonment with parole eligibility after serving thirty years].

INTRODUCTION

This case would allow the Court to provide desperately needed guidance on an important and frequently recurring question of capital habeas jurisprudence—namely, the extent to which the Constitution requires a state trial judge to instruct capital jurors on jury unanimity in sentencing. Of course, issues surrounding jury unanimity in capital sentencing arise every time that a trial court charges a capital jury. Yet the lower courts are sharply divided, both on what the Constitution requires regarding unanimity instructions, and on the appropriate role of federal courts in reviewing state court capital sentences predicated on allegedly improper unanimity instructions. This case presents an ideal vehicle for addressing these issues.

The panel majority below, relying on an idiosyncratic interpretation of this Court's precedent, determined that it is "clearly established" that state judges must *affirmatively instruct* jurors (1) that they need not unanimously reject the death penalty before considering a life sentence; (2) that the jury need not unanimously find a particular mitigating circumstance exists in order for a given juror to include consideration of that circumstance during the weighing of aggravating and mitigating circumstances; and (3) that the jurors need not unanimously conclude that the aggravating circumstances do not outweigh the mitigating circumstances in order to reject a death sentence. It thus overturned the capital sentence in this case, not based on any error in what the trial court *said* about unanimity, but rather because the panel believed that the state judge was constitutionally required to say *more*.

The panel majority's novel interpretation of this Court's decisions as affirmatively requiring such instructions represents an unprecedented and intrusive expansion of federal court oversight of state court jury instructions.

Moreover, it creates a direct conflict among the circuits with regard to these now-mandated (at least in the Sixth Circuit) instructions. Perhaps equally troubling, the panel majority's decision calls into question the validity of virtually every previously imposed Ohio death sentence. This Court should not allow the lower court here to use an erroneous interpretation of this Court's precedent to justify such a frontal assault on State sovereignty.

It was precisely this State sovereignty that Congress sought to protect through the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d). That statute, which governs Davis's petition here, permits a federal court to grant habeas relief *only if* the state court decision was "contrary to" or "an unreasonable application of" clearly established federal law. Prior to the panel majority's decision here, however, none of the federal circuits to consider the issue had determined that this Court's precedent "clearly established" that the Eighth Amendment requires a state trial judge to affirmatively make these instructions. In fact, directly contradicting the panel majority's decision below, a number of circuits, addressing nearly identical arguments, have concluded that not only is the right to such instructions not "clearly established," but that the Eighth Amendment does not require such instructions *at all*.

This conflict creates a disturbing inconsistency in capital sentencing. Because of the panel majority's decision, the Eighth Amendment now requires protections in the Sixth Circuit that are not required in any other circuit. To ensure the constitutionally required uniform treatment of capital defendants, however, the Eighth Amendment must provide the same protections on habeas review in Des Moines as it does in Dayton. Because of the frequency with which nearly identical jury instructions are given in capital sentencing proceedings across the nation, and because a capital

defendant's constitutional protections have become dependent on the "luck" of geography, this conflict among the circuits is not merely academic.

In addition to the inter-circuit conflict, this decision also exposes a direct intra-circuit conflict on these issues; a conflict that has not gone unnoticed by the district courts in the Sixth Circuit. Although the panel majority's decision was delivered less than six months ago, at least two district court decisions have already expressed concern over the intra-circuit conflict. *See, e.g., Taylor v. Mitchell*, Case No. 1:01CV601, 2003 U.S. Dist. Lexis 4383 at *56-65 (N.D. Ohio March 3, 2003) (attached as Appendix G); *Henderson v. Collins*, Case No. C-1-94-106 (S.D. Ohio July 10, 2003) (attached as Appendix F). The Warden recognizes that, generally, the proper method of resolving a split of authority within the Circuit would be for the lower court to convene *en banc*. Here, however, the circuit court has proven unwilling to do so—the Warden requested *en banc* review here, and the court declined.

While in most circumstances even an unresolved intra-circuit conflict would not warrant certiorari, given the heightened need for uniformity in this area of law, it provides additional support for review here. This Court has repeatedly warned against state capital sentencing schemes that are arbitrary or capricious. Indeed, some 20 years ago, Ohio changed its statute precisely to avoid such concerns. Here, however, the federal court system, the very institution designed to serve as a watchdog against arbitrariness, in fact runs the risk of creating inconsistency. Given the irreconcilable decisions within the circuit, identical cases may result in completely different results. Accordingly, the Warden respectfully requests this Court to grant certiorari on this important issue of capital habeas jurisprudence and resolve the conflict among (and within) the circuits by defining the proper scope of the Eighth Amendment here.

STATEMENT OF THE CASE

Early in the morning of November 26, 1991, Wiley Davis kidnapped Amy Perkins, the wife of a popular Cleveland radio personality, from a downtown parking lot. He robbed her at gunpoint, forced her to remove all of her clothes and brutally raped her. A short time later, Davis shot Amy Perkins in the head while stopped at an intersection and tossed her naked body out of the car. Witnesses saw Davis struggling to close the car door, and then noticed Ms. Perkins lying nude in the bushes nearby, unconscious and barely alive. Amy Perkins died that morning in the hospital.

Davis was indicted and tried on two counts of aggravated murder under Ohio Revised Code ("R.C.") 2903.01(A) and (B), as well as separate counts of kidnapping, rape, aggravated robbery and having a weapon while under a disability. Appx., pp. 74a-75a. At the close of trial, the judge instructed the jury that "the procedure which you must follow in arriving at your verdict in the sentencing phase of the trial is set forth in Revised Code Section 2929.03 of the Revised Code of the State of Ohio." *Id.* at 105a. The trial judge then explained how that statute operated:

> [Y]ou, the trial jury, must consider all of the relevant evidence raised at trial, the testimony, other evidence, the unsworn statement of the defendant, Wiley Davis, Jr., and the arguments of counsel, and you must determine whether the aggravating circumstances which the defendant, Wiley Davis, Jr., was found guilty of committing, are sufficient to outweigh any mitigating factor or factors you find that are present in this case.

> If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances which Wiley Davis, Jr. was found guilty of committing outwe[illegible] the mitigating factors, if any, then you mu[illegible] return such finding to the Court.
>
> *****
>
> On the other hand, if after considering all of the relevant evidence raised at trial, the testimony, other evidence, the unsworn statement of Wiley Davis, Jr. and the arguments of counsel, you find that the State of Ohio failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Wiley Davis, Jr., was found guilty of committing, outweigh the mitigating factors, then you will return your verdict reflecting your decision; that is, you must find that the State has failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant was found guilty of committing outweigh the mitigating factors.
>
> In this event you will then proceed to determine which of the two possible life imprisonment sentences to recommend to the Court.

Id. at 105a-106a.

After deliberating, the jury convicted Davis of all counts listed in the indictment and recommended death

sentences for the two aggravated murder counts. *Id.* at 75a. Acting on the jury's recommendation, the trial court sentenced Davis to death. *Id.*

In his direct appeal, Davis attacked his conviction on the grounds that the trial court improperly gave the jury an "acquittal-first" instruction, *i.e.*, that the trial court informed the jury that it could consider other sentencing options only after first unanimously deciding against recommending the death penalty. *Id.* at 85a-86a. Rejecting this argument, the Ohio Supreme Court reasoned that the trial court's instructions, when read as a whole, adequately informed the jury of the proper manner to deliberate and choose a penalty. *Id.* at 87a. The Ohio Supreme Court unanimously affirmed the lower court's judgment and upheld Davis's death sentence. *Id.* at 95a.

After unsuccessfully petitioning the state courts for post-conviction relief, Davis filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio. *Id.* at 33a. Agreeing with the Ohio Supreme Court's analysis, the district court noted that the jury instructions "made clear that any single juror could prevent a death penalty recommendation." *Id.* at 64a-65a. Specifically, "the court informed the jury that all twelve jurors must agree that the aggravating circumstances outweigh the mitigating circumstances before recommending that Davis get the death penalty." *Id.* at 65a. Moreover, the district court found that this instruction "when coupled with the court's admonition that no juror should surrender her individual conscience and good judgment during deliberations, ensured that the jury understood the proper manner of reaching its penalty recommendation." *Id. See also* Appx., pp. 107a-108a. After considering each of Davis's arguments in support of federal habeas relief, the District Court determined that under the AEDPA standard

"Davis fail[ed] to demonstrate his right to a writ of habeas corpus;" and, accordingly denied Davis's petition. *Id.* at 69a.

Thereafter, the Sixth Circuit granted a certificate of appealability on four of Davis's claims, one of which was his claim that the trial court's instructions prevented jurors from giving effect to mitigation. *Id.* at 3a. In a split decision, the panel reversed the lower court and vacated the death sentence that the Ohio trial court had imposed. It did so solely based on its conclusion that the challenged jury instructions were constitutionally invalid. According to the panel majority:

> [i]n sum, the silence in these instructions on the lack of unanimity required for mitigating circumstances, the improper "acquittal-first" instruction, and the unqualified instruction, "Now, as you know...the law requires that in order for you to reach a decision all 12 of you must be in agreement"—would have led a reasonable jury to apply an unconstitutional standard of unanimity at all stages in the deliberative process.

Davis v. Mitchell, 318 F.3d 682, 690 (6th Cir. 2003). The panel majority then determined that since the instruction required "that a jury must first unanimously reject the death penalty before it can consider a life sentence" it "preclude[d] the individual juror from giving effect to mitigating evidence" and, thus, violated the Eighth Amendment. *Id.* at 689.

In dissent, Judge Boggs began by noting that the panel majority's opinion attacked "three parts of the instruction process: (1) what it calls an 'acquittal-first' instruction; (2) the failure to give an explicit instruction that unanimity is not required for any individual juror to find a mitigating factor; and (3) the giving of a standard instruction

that the return of a formal verdict requires jury unanimity." *Id.* at 691 (Boggs, J., dissenting). Criticizing the panel majority's findings, however, Judge Boggs noted that "[e]ach of these three aspects of the instructions is unexceptionable, and the action of the Ohio Supreme Court in upholding these instructions certainly does not constitute an unreasonable application of any clearly established precedent of the United States Supreme Court." *Id.*

With regard to the "acquittal-first" instruction, Judge Boggs explained that the panel majority's "objection to 'acquittal-first' instructions is not to the order of consideration, but to the possibility that a juror may be led to believe that the jury must first unanimously reject death before considering a life sentence, rather than allowing a single juror to prevent a death sentence by creating a deadlock." *Id.* at 692. Judge Boggs reminded the panel majority, however, that "the Constitution does not forbid a jury from considering a death sentence before considering a life sentence." *Id.*

Judge Boggs similarly disputed the panel majority's second finding—that *Mills v. Maryland*, 483 U.S. 367 (1988), requires an explicit instruction that unanimity is not required for any individual juror to find a mitigating factor. After comparing the jury instructions in *Mills* to those here, Judge Boggs noted that the unacceptable scenario presented in *Mills* is "a far cry from the situation presented in this case." *Davis*, 318 F.3d at 694. In sum, Judge Boggs explained that while *Mills* and *McKoy v. North Carolina* require that jury instructions must not "'prevent the jury from considering . . . any mitigating factor that the jury does not unanimously find . . .,' [n]owhere [do they] state that silence in instructions on the lack of a unanimity requirement for mitigating circumstances violates the Eighth Amendment." *Id.* at 695 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 435 (1990)).

With respect to the panel majority's third objection—"that the verdict forms reflected a unanimity requirement in finding that the aggravating do not outweigh the mitigating circumstances"—Judge Boggs chastised the panel majority for apparently converting a state law requirement into a ground for federal habeas relief. *Id.* at 696. Pointing out that "[i]t is difficult to say what the court's argument is at all," Judge Boggs conceded that "Ohio requires its trial courts to instruct juries that one juror has the ability to block the death penalty." *Id.* "However," Judge Boggs explained, "that is a matter of state law, not federal law," and, therefore, constitutes an insufficient ground for federal habeas relief. *Id.* In his conclusion, Judge Boggs lucidly illustrates his difficulties with the panel majority's opinion:

> As nearly as I can gather, the court's complaint is that the judge did not instruct the jury to the effect that "any one of you can prevent the imposition of the death penalty on this defendant, simply by refusing to sign the death verdict. You can do so for any reason or for no reason." While that is a correct statement of existential truth, no case, and certainly no Supreme Court case, has come close to requiring that such an instruction be given.

Id. Recognizing that the panel majority's decision had created an intra-circuit conflict, Warden Mitchell requested rehearing *en banc*. The court denied that request on April 25, 2003.

Warden Mitchell now asks this Court to grant certiorari and to reverse the panel majority's decision, thereby alleviating the considerable confusion it has already caused.

REASONS FOR GRANTING THE WRIT

I. With Its Decision Below, The Panel Majority Created A Conflict—Both Among The Federal Circuits And Within The Sixth Circuit—Regarding The Extent To Which A Judge Must Instruct The Jury On Unanimity In The Capital Sentencing Process.

A. The circuit courts are in conflict over whether this Court's decisions "clearly establish" that a State trial judge must expressly instruct the jury that each juror is free to consider a given mitigating factor regardless of whether the jurors unanimously agree that the factor is present.

It is well-settled law that a State cannot require jurors during capital sentencing deliberations to consider only those mitigating factors that the jury unanimously finds are present. *See Mills*, 486 U.S. at 374-375; *McKoy*, 494 U.S. at 435. The panel majority's decision below, however, went far beyond this commonsense proposition. It found that, *as a matter of "clearly established" constitutional law*, a state trial court judge is required to *affirmatively instruct* the jurors that they need not be unanimous in finding and considering mitigating factors. In so doing, the Sixth Circuit created a direct conflict among the circuits regarding the need for such an instruction.

In *Mills*, this Court struck down a death sentence imposed under Maryland's capital punishment scheme because the jury instructions might have precluded the jury from considering mitigating evidence unless the jury agreed unanimously on each mitigating factor. 486 U.S. at 384.

There, the statute required the jury to collectively write either "yes" or "no" next to each mitigating factor. The Court was concerned that, "in attempting to complete the verdict form as instructed, the jury may well have thought that they were precluded from considering any mitigating evidence unless all [twelve] jurors agreed on the existence of a particular mitigating circumstance." *Id.* That is, the Court was concerned that the verdict form would affirmatively mislead the jury about the need for unanimity. Similarly, in *McKoy*, this Court found unconstitutional any requirement that "prevents the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury does not unanimously find." 494 U.S. at 435.

The panel majority below claimed that the jury instructions here violated *Mills* and *McKoy*—not because the trial judge affirmatively misled the jury, but rather because "the jury was never told, either expressly or impliedly, that individual jurors may consider mitigating circumstances in the weighing process regardless of the lack of agreement with other jurors as to the presence of that factor." *Davis*, 318 F.3d at 689-690. That is, the court below located in this Court's precedent not only an obligation to avoid misleading the jury, but also an obligation in all cases to *expressly instruct* the jurors that they need not be unanimous in finding mitigating factors. In other words, according to the court below, silence on unanimity is not golden.

In adopting this novel reading of *Mills* and *McKoy*, the panel majority created a direct conflict with its sister circuits on the need to affirmatively instruct jurors on the interplay between unanimity and mitigating factors. The Tenth Circuit, for instance, in sharp contrast to the decision below, recently reaffirmed that "a trial court need *not* . . . expressly instruct a capital sentencing jury that unanimity is not required before each juror can consider a particular mitigating circumstance." *LaFevers v. Gibson*, 182 F.3d

705, 719 (10th Cir. 1999) (quoting *Duvall v. Reynolds*, 139 F.3d 768, 791 (10th Cir. 1998)) (emphasis added).

In *LaFevers*, the state court had expressly instructed on the need for unanimity in finding aggravating circumstances, but was silent with regard to whether such unanimity was also necessary for mitigating circumstances. The defendant argued that the failure to instruct one way or the other "erroneously implied that the jury was required to find a mitigating factor unanimously before each juror could consider the mitigating circumstance in determining whether to impose the death penalty," and thus violated *Mills;* a claim nearly identical to that advanced by the defendant below. *Id.* at 719. The Tenth Circuit, however, rejected that claim. It admitted that the jury instructions there "required the jury to 'determine,' 'decide,' and 'find' whether mitigating circumstances existed without any reference to unanimity." *Id.* But it found that this silence on unanimity did not violate *Mills* because the silence did not "impose[] an express or implied unanimity requirement on the jury's consideration of mitigating evidence." *Id.* In short, the Tenth Circuit and the panel majority below directly disagree on the effect of silence with regard to unanimity on mitigating circumstances.

Agreeing with the Tenth Circuit, a number of other circuits have found no constitutional violation where a state trial judge instructs on unanimity as to aggravating circumstances, but remains silent as to unanimity with regard to mitigating circumstances. The Third Circuit, for example, determined that jury instructions nearly identical to those here did not violate *Mills* since "[n]either the court nor the verdict sheet stated that the jury must unanimously find the existence of particular mitigating circumstances or that the jury could weigh only those circumstances which it found

unanimously."[1] *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 307-308 (3d Cir. 1991). The court concluded that although the instructions, like those here, required that the jury "unanimously agree that the aggravating must outweigh the mitigating, [that] is not the same as unanimously agreeing that a mitigating factor exists." *Id.* at 308. As such, the Court determined that the instructions did not violate *Mills*; a result directly contrary to the panel majority's below.

Likewise, in *Powell v. Bowersox*, the Eighth Circuit determined that the following jury instruction did not violate *Mills*: "If you unanimously find that one or more mitigating circumstances exists sufficient to outweigh the aggravating circumstances found by you to exist, then . . . you must return a verdict fixing defendant's punishment at imprisonment for life." 112 F.3d 966, 970 (8th Cir. 1997). In *Powell*, the court noted that the "challenged instructions deal with balancing mitigating circumstances against aggravating factors, not with determining what mitigating circumstances exist." *Id.* at 971. The court concluded, therefore, that since no reasonable juror "could have interpreted the word 'unanimously' in such a way as to bestow upon each member of the jury an unconstitutional veto power over the consideration of mitigating evidence," the jury instructions did not run afoul of *Mills*. If anything,

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[1] In *Zettlemoyer*, the jury instructions stated: "The verdict, of course, must be unanimous. Again, if you find unanimously, beyond a reasonable doubt, the aggravating circumstance that I have mentioned...that is an aggravating circumstance. If you find that aggravating circumstance and find no mitigating circumstances or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find, your verdict must be the death penalty. If, on the other hand, you find that the Commonwealth has not proven an aggravating circumstance beyond a reasonable doubt or if they have, that the mitigating circumstances outweight (sic) the aggravating circumstances, then you must bring in a verdict of life imprisonment." *Zettlemoyer*, 923 F.2d at 307.

however, the challenged instruction in *Powell* created a much greater implication of the need for unanimity on mitigating circumstances than the Ohio jury instructions challenged below. Thus, in deciding that the instruction there was constitutionally valid, the Eighth Circuit, like the Third and Tenth above, necessarily adopted a position directly contrary to that advanced by the panel below.

In fact, even the case the panel majority cites to support its new requirement, *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), actually refutes it. There, the court expressly noted that "the absence of such express statement [as to mitigating circumstances] is not dispositive." *Id.* at 925 n.5. *See also Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997) (no *Mills* violation where trial court instructed jury that it must unanimously find the existence of aggravating factors because instructions never required jury to find any mitigating factor unanimously); *James v. Whitley*, 926 F.2d 1433, 1448-1449 (5th Cir. 1991) (similar jury instructions found not to violate *Mills*); *Gacy v. Welborn*, 994 F.2d 305, 307-308 (7th Cir. 1993) (no substantial possibility that jury was misled into believing unanimity required when judge failed to explain statutory provision that death penalty could not be imposed if even one juror found mitigating circumstances outweighed aggravating circumstances); *Parsons v. Galetka*, 57 F. Supp.2d 1151, 1182 (D. Utah 1999).

Before the Sixth Circuit's decision below, neither this Court, nor any of Sixth Circuit's sister circuits, required trial courts to affirmatively instruct jurors that they need not unanimously find that a given mitigating factor exists. The Ohio Supreme Court's decision, therefore, could hardly be considered "contrary to" or "an unreasonable application of" this Court's decision in *Mills*. The panel majority's conclusion to the contrary has created conflict among the circuits on an issue of critical importance to the capital

sentencing process.[2] This issue, if left unresolved, will continue to create confusion with regard to the jury charge in every capital trial. Because of the frequency with which this issue will arise, and because the Eighth Amendment should establish a uniform constitutional baseline, the Warden respectfully requests this Court to grant certiorari and resolve the conflict among the circuits by reversing the decision below.

B. The decision below creates a conflict among the circuits regarding whether or not this Court's precedent clearly establishes that a state trial judge must instruct the jury that it need not unanimously reject death before considering a lesser penalty.

The panel majority's decision below has also created an additional circuit conflict regarding what *Mills* requires. According to the majority below, *Mills* clearly establishes that a judge must "inform[] the jurors that a life verdict can be rendered by a jury that has not first unanimously rejected the death penalty." *Davis*, 318 F.3d at 689. This conclusion,

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[2] The panel majority has also created a direct conflict within the Sixth Circuit. At least five other Sixth Circuit panels have expressly concluded that a state court trial judge is not required to affirmatively instruct jurors that they need not unanimously find mitigating circumstances. *See, e.g., Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120 (6th Cir. 1990) (*en banc*) (finding no constitutional violation where a trial court instructs the jury that it must be unanimous in finding an aggravating factor, while remaining silent as to the lack of a unanimity requirement for finding mitigating circumstances); *Roe v. Baker*, 316 F.3d 557, 564 (6th Cir. 2002) (nearly identical unanimity instructions as those below do not violate the Constitution); *Scott v. Mitchell*, 209 F.3d 854, 876 (6th Cir. 2000) (same); *Abdur'Rahman v. Bell*, 226 F.3d 696, 712 (6th Cir. 2000) (same). As described in Section II below, review is appropriate on this basis alone because of the heightened need for uniformity in this area of the law.

however, in addition to resting on a misreading of *Mills*, conflicts with decisions in at least three other circuits.

As noted above, here the trial court instructed the jurors (1) that if the jury unanimously agreed on a death sentence, it should return that verdict, and (2) that if it found "that the State of Ohio failed to prove beyond a reasonable doubt that the aggravating circumstances . . . outweigh the mitigating factors, then you will return your verdict reflecting your decision," and that (3) "[in the latter] event you will then proceed to determine which of the two possible life imprisonment sentences to recommend to the Court." *Id.* at 685. As the dissent notes, the majority's objection to these instructions "is not to the order of consideration, but to the possibility that a juror may be led to believe that the jury must first unanimously reject death before considering a life sentence, rather than allowing a single juror to prevent a death sentence by creating deadlock." *Id.* at 692 (Boggs, J., dissenting). That is, the instructions tell the jury what to do if the jury is unanimous (either pro or con) in its decision on a capital sentence, but do not tell the jury what to do in the event it does not reach a unanimous decision on a death sentence.

According to the majority below, this failure to instruct on what to do if unanimity is lacking violates *Mills*. *Id.* at 689-690. The panel majority's decision, therefore, mandates an additional jury instruction in all future capital trials in the Sixth Circuit; one that affirmatively explains how the jury should proceed in the event it does not unanimously agree on a death sentence.

This Court, however, has expressly held that judges are *not* constitutionally required to instruct the jury as to the effect of failing to unanimously reach a verdict. *Jones v. United States*, 527 U.S. 373, 382 (1999). Noting that it has never suggested "that the Eighth Amendment requires a jury

to be instructed as to the consequences of a breakdown in the deliberative process," this Court chastised such instructions as encouraging deadlock and undermining the strong governmental interest in unanimous verdicts. *Id.* By finding that *Mills does* require such an instruction, the panel majority's decision below directly contradicts this Court's reasoning in *Jones*.

Moreover, the panel majority created a conflict among the circuits regarding whether a trial judge is constitutionally required to instruct the jury as to the consequences of a lack of unanimity. After an exhaustive review, the Warden was unable to uncover even one opinion consistent with the panel majority's finding that *Mills* requires a trial judge to instruct the jury that it need not unanimously agree to reject death before considering a lesser sentence. Beyond the fact that none of its sister circuits has extended *Mills* in this manner, as a general matter, a number of federal circuits have concluded that a trial judge is *not* constitutionally required to instruct the jury as to its options should it fail to unanimously reject the death penalty. For instance, reviewing a jury instruction nearly identical to the one below,[3] the Third Circuit concluded that the trial judge was not constitutionally required to "instruct the jury that, in the event it could not unanimously agree that the death penalty should be imposed, the court would impose a life sentence." *Zettlemoyer*, 923 F.2d at 309.

Likewise, the Eleventh Circuit determined that "because of the general interest the criminal justice system has in unanimous verdicts," the trial court "is not required to instruct the jury on the consequences of the jury's inability to reach a unanimous verdict." *United States v. Chandler*, 996 F.2d 1073, 1089 (11th Cir. 1993). Citing this Court's *Jones* decision, the Fourth Circuit similarly concluded that "the

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[3] *See* note 1, *supra*, for a description of these jury instructions.

lack of an instruction regarding the consequences of a deadlock was not unconstitutionally coercive." *Lyons v. Lee*, 316 F.3d 528, 535 n.8 (4th Cir. 2003). *See also Alexander v. Johnson*, 211 F.3d 895, 897 n.5 (5th Cir. 2000). With its decision, therefore, the panel majority not only created a circuit conflict regarding whether *Mills* "clearly establishes" the trial court to render such an instruction, but it also created a conflict on the separate issue of whether there is any such constitutional requirement *at all*.

The panel decision below also creates a conflict within the Sixth Circuit itself. In direct conflict with the decision below, three other panels have held that a judge is not constitutionally required to inform the jury as to "the consequences of a failure to achieve unanimity" in reaching a verdict. *Coe v. Bell*, 161 F.3d 320, 339-340 (6th Cir. 1998); *Buell v. Mitchell*, 274 F.3d 337, 357 (6th Cir. 2001) (rejecting "a constitutional unanimity requirement or a requirement of a jury instruction as to the consequences of a breakdown in the deliberative process"); *Roe*, 316 F.3d at 564 (same); *Henderson v. Collins*, 262 F.3d 615, 621-622 (6th Cir. 2001); *Scott*, 209 F.3d at 873-876. The panel majority decision below, however, squarely contradicts these prior panel opinions, *see Davis*, 318 F.3d at 692 (Boggs. J., dissenting), and instead sides with dicta from yet another Sixth Circuit opinion. *See Mapes v. Coyle*, 171 F.3d 408, 416 (6th Cir. 1999) (suggesting that an acquittal-first instruction violates the Eighth and Fourteenth amendment, but ultimately concluding that the claim was procedurally defaulted). As discussed below (*see* Section II), this intra-circuit conflict further supports the need for certiorari here.

In short, the panel majority's conclusion—that *Mills* clearly established that the Constitution requires a jury instruction reminding jurors of their "options" should they fail to unanimously reject the death sentence—has created two separate circuit conflicts: (1) whether *Mills* clearly

established such an instruction; and (2) whether such an instruction is constitutionally required at all. Because this issue will resurface in every capital trial, the Warden respectfully requests this Court to grant certiorari and resolve the open questions regarding the meaning of *Mills*.

C. The panel majority's decision creates a conflict among the circuits, as well as a conflict within the Sixth Circuit, regarding whether federal law "clearly establishes" that trial judges are required to affirmatively instruct juries that one juror has the ability to block a death sentence, and that they can do so for any reason or no reason.

The panel majority's third, and final, complaint is that "the unqualified instruction, 'Now as you know . . . the law requires that in order for you to reach a decision all 12 of you must be in agreement' would have led a reasonable jury to apply an unconstitutional standard of unanimity" at the sentencing phase. *Davis*, 318 F.3d at 690. In striking Davis's sentence on these grounds, however, the court below created yet another equally troublesome conflict among the circuits.

The conflict is perhaps best illustrated by comparing the Sixth Circuit's treatment of the jury instruction here with the Third Circuit's review of nearly identical jury instructions in *Zettlemoyer*, 923 F.2d at 307-308.[4] In direct contrast to the panel majority below, the *Zettlemoyer* court concluded

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[4] In *Zettlemoyer*, the jury instructions called for a sentence of death if jurors "unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstances (sic) and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances." *Id.* *See also*, note 1, *supra*.

that informing the jury that it "must unanimously agree that the aggravating must outweigh the mitigating is not the same as [requiring it] unanimously agree[] that a mitigating factor exists," which would violate *Mills*. *Id.* at 308. In that case the court found no constitutional infirmity since the jury instructions required unanimity only as to the "ultimate conclusion," rather than each "interim step in its deliberations," *i.e.*, the finding of mitigating factors. Similarly in *Arnold v. Evatt*, the Fourth Circuit held that instructing the jury that its sentence must be unanimous, and that it must unanimously find the existence of any aggravating circumstances, did not violate *Mills* since the jury instructions at issue "never required the jury to find any mitigating factor unanimously." *Arnold*, 113 F.3d at 1363. *See also Powell*, 112 F.3d at 971; *James*, 926 F.2d at 1448-1449. What these cases recognize, as the dissent did below, is that this Court has found a unanimity requirement problematic in only two situations: "(1) to reject the death penalty, and (2) as to the presence of a mitigating factor." *Davis*, 318 F.3d at 696 (Boggs, J., dissenting). A general instruction requiring unanimity as to the "ultimate conclusion," however, always has been, and still remains, entirely compatible with the Constitution.

Just like the decisions cited above, the instructions at issue here did not require unanimity as to an "interim step in the deliberations," which would violate the Constitution under *Mills*, but only as to the overall weighing process, which has been repeatedly held permissible. *See* discussion, *supra*. In fact, as noted above, the panel majority's new requirement—that the trial judge must affirmatively notify the jury that one juror has the ability to block the death penalty—directly contradicts this Court's warning that such instructions encourage deadlock and undermine the strong governmental interest in unanimous verdicts. *See Jones*, 527 U.S. at 381-384.

Nor does the panel majority's reliance on *Ohio v. Brooks*, 661 N.E.2d 1030 (Ohio 1996), do anything to save its conclusion. *See Davis*, 318 F.3d at 689. While *Brooks* does suggest the use of an instruction affirmatively informing the jury that any single juror has the ability to block the death penalty, *see Brooks*, 661 N.E.2d at 1042, it reached this decision on state law grounds, not federal constitutional grounds. And this Court itself has held that "the fact that [an] instruction was allegedly incorrect under state law (in this case a state law that came long after Davis's trial) is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). Moreover, even if the Ohio Supreme Court reached its decision on federal constitutional grounds, AEDPA restricts habeas review to those constitutional rights "clearly established" by this Court's precedent, not that of Ohio's Supreme Court. *See* 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 413 (2000).

The *only* issue on collateral review in federal court is whether a state court decision violated a defendant's federal constitutional rights. Before the panel majority's decision below, requiring the jury to unanimously agree on the outcome of the weighing process did not amount to a constitutional violation under *Mills*. In fact, the Sixth Circuit itself has repeatedly held that "such a unanimity instruction as to sentencing recommendations of death [does] not violate the Constitution." *Roe*, 316 F.3d at 564; *Coe*, 161 F.3d at 339-340; *Scott*, 209 F.3d at 876.

What makes the panel majority's conclusion in this regard all the more baffling is that the Sixth Circuit previously determined that the actual jury instructions at issue here *do not run afoul* of either the Constitution or *Brooks*. *Henderson*, 262 F.3d at 622. In *Henderson*, the Sixth Circuit noted that Davis's instructions were constitutional because they "adequately informed the jury that a recommendation of death required unanimity and the

instruction made the jurors aware that any one of them could block the imposition of a death sentence." *Id.* Consequently, the very instructions at issue here have been upheld as a model of constitutionality by one panel while being struck down by another—a result that raises a troubling specter of inconsistency.

Like the other two "constitutional violations" the panel majority identified below, this Court has never determined that a unanimity instruction as to the results of the weighing process is improper. As a result, the panel majority's decision has created a conflict with this Court's decisions, with its sister circuits, and with the Sixth Circuit's own previous decisions, regarding this issue. Given the panel majority's decision here, a state trial judge must now give an additional jury instruction expressly reminding the jury that each juror may prevent a death sentence. As the dissent eloquently put it, however, "[w]hile that is a correct statement of existential truth, no case, and certainly no Supreme Court case, has come close to requiring that such an instruction be given." *Davis*, 318 F.3d at 697 (Boggs, J., dissenting). Accordingly, the Warden respectfully requests this Court to grant certiorari and correct the erroneous intrusion on State sovereignty created by the decision below.

II. The Decision Below Creates Troubling Inconsistencies In The Application Of The Death Penalty And Calls Into Question The Validity Of Nearly Every Current Capital Sentence In Ohio.

A. The intra-circuit conflict provides an independent basis for granting certiorari here.

As noted above, in addition to creating a number of inter-circuit conflicts, the decision below also creates a direct intra-circuit conflict. Although the Warden would not

normally rely on such an intra-circuit conflict to support a request for certiorari, the nature of the conflict here provides an independent basis for this Court to grant certiorari in this case.

Because of the severity and irrevocability associated with the death penalty, this Court has repeatedly held that the Eighth Amendment requires that death sentences not be imposed arbitrarily or capriciously. *See, e.g., Jones*, 527 U.S. at 381; *Buchanan v. Angelone*, 522 U.S. 269, 274 (1998). Indeed, Ohio changed its capital sentencing scheme to insure that this requirement is met, and it was successful in its efforts. *See e.g., Jamison v. Collins*, 100 F. Supp.2d 647 (S.D. Ohio 2000), *aff'd* 291 F.3d 380 (6th Cir. 2002) ("The Ohio capital punishment scheme assailed by Petitioner falls within the boundaries of the standard set by the Supreme Court.").

Now, however, despite this recognized need for uniformity, the Sixth Circuit itself is fostering inconsistency in the application of the death penalty. With decisions like *Davis* and *Mapes* on one side of the argument and *Roe*, *Buell* and *Scott* on the other, the validity of a particular sentence no longer rests upon a clearly established rule of law, but rather on which of two competing, and irreconcilable, lines of precedent the court elects to apply.

This intra-circuit conflict is already creating confusion at the district court level. In *Henderson v. Collins*, Case No. C-1-94-106 (S.D. Ohio July 10, 2003) (attached as Appendix F), for instance, the court found it necessary to reconsider its earlier ruling on the validity of the defendant's "acquittal-first" instruction. Although the Sixth Circuit had already ruled that Henderson's instructions were acceptable, *see Henderson*, 262 F.3d at 622-623, the district court on remand noted that the *Henderson* instructions were "indistinguishable" from the *Davis* instructions. Appx., pp.

112a-114a. Thus, the court determined that "the decision made by the Sixth Circuit [upholding Henderson's conviction] has been called into grave doubt." *Id.* at 114a. It therefore vacated its earlier ruling and granted a "writ of habeas corpus in regard to jury instructions." *Id.* at 115a. In doing so, the court further opined that the decision below in this case "may well create confusion and lead to conflicting decisions in district courts." *See also Taylor v. Mitchell*, Case No. 1:01CV601, 2003 U.S. Dist. Lexis 4383 at *64 (N.D. Ohio March 3, 2003) (noting that *Davis* creates a conflict with *Coe*, *Scott*, and *Roe*, and further noting that "the *Davis* court did not distinguish—indeed, it failed to cite"—those cases) (attached as Appendix G).

The Warden recognizes that, normally, intra-circuit conflicts are more properly resolved *en banc*, and the Warden attempted to pursue that course here. The Sixth Circuit, however, declined that request. Appx., pp. 31a-32a. The heightened need for uniformity in capital sentencing rules, combined with the Sixth Circuit's unwillingness to accept *en banc* review, provides an additional ground supporting certiorari here.

B. The decision below destroys Ohio's ability to implement its capital sentencing scheme.

In addition to creating a conflict that is already causing confusion and inconsistency in the courts below, the decision here also completely undermines Ohio's ability to effectively implement its capital sentencing scheme. There are over 200 inmates on death row in Ohio. Nearly all of these inmates received capital sentences based on jury instructions virtually indistinguishable from those held to be constitutionally invalid below. Thus, if allowed to stand, *the panel majority's erroneous opinion below will call into question the constitutionality of nearly every single currently-imposed Ohio capital sentence*. And, as *Taylor*

and *Henderson* demonstrate, Ohio's death row inmates are already incorporating *Davis* into their litigation strategies. Moreover, as the above discussion demonstrates, cases from other circuits suggest that very similar instructions are also used in other States. Thus, the erroneous decision below threatens to create confusion across the country.

CONCLUSION

As the panel majority itself noted, "[t]he developing law regarding the balancing of mitigating factors against aggravating factors in death penalty cases is of relatively recent vintage and many questions about its application remain unanswered." *Davis*, 318 F.3d at 686. Unfortunately, its decision below adds to the confusion. Accordingly, the Warden respectfully urges this Court to accept certiorari to provide clear guidance on these vitally important and frequently recurring questions of capital habeas jurisprudence.

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